IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1961

No. 493

J. L. ENOCHS, DISTRICT DIRECTOR OF INTERNAL REVENUE,

Petitioner,

versus

WILLIAMS PACKING & NAVIGATION CO., INC.,

Respondent.

BRIEF FOR THE RESPONDENT.

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QUESTION PRESENTED.

WHETHER UNDER THIS COURT'S DECISION IN *MILLER V. NUT MARGARINE COMPANY*, 284 U. S. 498, THE DISTRICT COURT HAD JURISDICTION TO ENTERTAIN A SUIT TO RESTRAIN THE COLLECTION OF TAXES ALLEGEDLY ERRONEOUSLY ASSESSED DESPITE THE PROHIBITION OF SECTION 7421(a) OF THE INTERNAL REVENUE CODE OF 1954 WHERE THE FOLLOWING EXISTED:

(1) At no time after the adoption of the statutes imposing Social Security and unemployment taxes did the government contend that the respondent was liable for the taxes, and

That the first contention made with respect to the relationship between the fishermen and packers was that the captains and members of the crew were not the employees of the persons to whom they sold their product.

(2) Consistent with the government's contention that the relationship of the packers and captains-crew members was not that of employer-employee, the government did not resist the issuance of a temporary restraining order in this case.

(3) Payment of the assessment would have wrecked the corporation and thrown it into bankruptcy.

(4) There was no clear adequate or plain remedy at law available to the plaintiff.

(5) The delay in the trial of the case was caused by the government.

(6) The plaintiff was not a taxpayer.

STATEMENT.

A. The Initiation of the Present Proceedings.

The respondent would add to the statement of the petitioner that at the hearing on the preliminary injunction the attorneys representing the government had been instructed to appear and not object to the issuance, nor

could they consent to it. Those instructions came directly from Washington, and they were to the effect that the U. S. attorneys were not to object to the restraining order in the case. (R. pp. 26, 27, 28.)

The delay in the trial of the case was occasioned by the government. The decree and injunction was signed on September 9, 1957. (R. p. 7.) The government's answer was not filed until May 29, 1958. (R. p. 7.) In June of 1958, the case was continued by consent of both parties with the idea that an agreed stipulation of facts could be entered. (R. p. 27.) A stipulation of facts was filed with the government for its approval, and the stipulation was held in abeyance for "a long, long time." (R. p. 27.) Shortly before Christmas in 1958 plaintiff's counsel advised the Court that no agreement could be reached with respect to the stipulation, and it was then that the Court set the case for trial. (R. p. 27.)

The preliminary injunction issued in *Miller v. Nut Margarine* made no finding that the Director's assessment was arbitrary, capricious or otherwise illegal.

B. The Evidence Produced at the Trial.

Respondent adds to the summary of the evidence produced at the trial the following:

1. Williams Packing & Navigation Co., Inc., and DeJean Packing Company.

The corporation was engaged only in the production of raw material and sold practically all of its products to the DeJean Packing Company. At the time of the filing of the suit it owned two vessels worth approxi-

mately $21,000 or $22,000, and its only assets of any value were the leasehold interest it had upon boats and the good will and value of its right to fish in the waters of Louisiana. (Opinion of the lower Court, R. p. 279.) The corporation's charter had value because it gave it valuable rights to fish in Louisiana. (Opinion of the lower Court, R. p. 280.) The corporation was engaged in business since its formation in 1944. (R. p. 44.) "It was not organized for the purpose of evading the payment of any taxes of any type and at the time of its incorporation as well - - - (at the time of the trial its purpose was to engage) in a legitimate business which it has done." (R. p. 274, opinion of the lower Court.)

The respondent and the DeJean Packing Company are engaged in different business enterprises, the former being in the business of leasing or chartering shrimp boats and purchasing raw seafood products. The latter is in the business of processing seafood. (Opinion of the Court, R. pp. 277, 279.)

The Court found as a fact that the DeJean Packing Company was a completely separate and independent entity from that of the petitioner and the DeJean Packing Company was under no duty or requirement of law to pay the tax of the corporation. (R. p. 279.)

2. **Respondent's Methods of Operation.**

The respondent takes exception to the government's position that the value of the catch was fixed by prices which it determined. The record shows that the captains and members of the crew who had belonged to the Gulf Coast Shrimpers and Oystermen's Associa-

tion had been engaged in the fixing of prices, and it was for that reason that the government sought and obtained a conviction under the Sherman Anti-Trust Act in the union. Subsequent to that conviction prices were fixed on supply and demand. (R. p. 38.)

3. The Financial Relationship Between Respondent and DeJean.

We take exception to the petitioner's statement that "Frieberger admitted that it was within the scope of his employment to determine how much money should be paid to the respondent." For we think that the fair inference to be drawn from that testimony is that the determination was made from the books of the corporation or from the partnership and was based upon the customs which had grown up over the years.

4. Respondent's Financial Condition.

The record shows that the final determination of the alleged tax liability of the respondent was not made until August 30, 1957. (Exhibit "A" to Complaint, R. p. 5.) The corporation lost money in 1956, and, by June 30 of 1957, some months before the final determination of the assessment, the corporation was a deficit corporation. (Defendant's Exhibit 14, Schedule A, line 8, R. p. 233.) There is no showing that the surplus which the corporation once enjoyed was intentionally reduced. We take very definite exception to the government's conclusion contained in its statement of the case found in page 9 of its brief to the effect that the respondent could have litigated the issues by the payment of $2,000 and take further exception to the construction of the case of *Flora*

v. U. S., 262 U. S. 145, 171, Footnote 37, and to *Steel v. U. S.*, 280 Fed. (2d) 89 (C. A. 8). This inferential argument is contained in the statement of the case and is not developed in its summary of the argument or in the argument in chief.

5. The Evidence on the Question of Employee Status of Fishermen.

We would add to the government's summary of the evidence relied upon by the petitioner the following: Without exception the witnesses for the government and for the respondent all stated that in securing a crew to operate the vessels the captain of the vessel to whom the boat had been entrusted had the sole discretion to hire whom he pleased, fire the crew, direct and control them as he saw fit. (R. pp. 157, 172, 182, 206, 226, 261.) The captains of the vessels determined how the boats were rigged and the method of rigging the boats varied from captain to captain. (R. p. 172.) The provisions such as food, fuel and ice were ordered by the captain and crew without restriction as to quantity. (R. pp. 158, 173.) The captain and members of the crew built up an equity in the rig of the boat and could draw it out or apply the equity towards additional improvements on the rig. (R. p. 158.) If the captain and crew desired a radio on the boat, they obtained an equity in the radio, as it was paid for on the share basis. (R. p. 159.) In one instance a captain who had owned his own boat and sold his products to the respondent sold the boat to the respondent and continued to operate the boat. The method of operation after he sold it was no different than before. (R. p. 157.) Several of the government's witnesses testified to isolated inci-

dences which its attorneys believed tended to show control on the part of the respondent over the captains and members of the crew. The government sought to establish that Williams Packing & Navigation Co., Inc., exercised control by restricting the amount of ice the captain and crew could order. That testimony was drawn from George Williams (R. p. 244), who stated that food at the Hall Grocery was more expensive than at other places (R. p. 245) and that the captain acted in the capacity of a foreman for the company. It was shown that this witness had engaged in a bitter strike against the respondent not long before the trial of this case (R. p. 247) and had written a letter in which he suggested to the United States Department of Justice that the U. S. attorney in Mississippi should not handle the trial of this case. (R. p. 250.) Another government witness, Wilfred Borque, had a suit pending against respondent and DeJean Packing Company and had engaged in the same strike in which the witness George Williams had participated. (R. p. 258.)

SUMMARY OF ARGUMENT.

While Section 7421(a) of the Internal Revenue Code 1954 prohibits the restraining of an assessment or collection of tax, there is a well-recognized exception to that statute. The respondent contends first that it operated for a considerable period of time during which the government never contended that the captains and fishermen were its employees and that the first contention made with respect to the relationship of the fishermen was that they were not the employees of the persons to whom they sold their products. Second, that the government acquiesced, or at least did not resist, the issuance of an

injunction in this case. Third, that the amount of the assessment was so large as to be ruinous on the respondent had it been required to pay first and sue later. Fourth, respondent had no clear, adequate or plain remedy at law, there being no statute, regulation or judicial determination at the time of the filing of the suit which permitted the respondent to litigate the issues upon payment of less than the full amount of the assessment. Fifth, the delay in the trial of the case is caused by the government, which was deprived of nothing to which it was entitled. Sixth, the plaintiff was not a taxpayer.

It is further submitted that these equitable considerations bring this case within the *rationale* of *Miller v. Nut Margarine* and Court of Appeals cases which have considered *Miller v. Nut Margarine* in cases involving the legality of assessments of FICA and FUTA taxes.

It is finally argued that the petitioner's authority cited in its brief is not controlling in the disposition of this case.

ARGUMENT.

I.

At No Time After the Adoption of the Statutes Imposing Social Security and Unemployment Taxes Did the Government Contend that the Respondent Was Liable for the Taxes.

The respondent was chartered in 1944 and operated approximately ten[1] years under the assumption that

[1] **Gulf Coast Shrimpers & Oyster Assn. v. United States** (C. A. 5), 236 Fed. (2d) 658, cert. denied 352 U. S. 927. The action of the union violative of the Sherman Anti-Trust Act took place during 1950-53. The date of the conviction does not appear in the report, but it had to be subsequent to 1953.

it was not the employer of the captains and members of the crew before any contention was made by the government with respect to the relationship. When the government chose to enforce the provisions of the Sherman Anti-Trust Act[2] against fishermen's union, it was met at the outset by the conclusion that the members of the union were the employees of the persons to whom they sold their catch. In pursuing the indictment of the union the government strongly and successfully urged that the employer-employee relationship did not exist.

Gulf Coast Shrimpers and Oystermen's Assn. was a case generating considerable interest in the fishing industry on the Mississippi Gulf Coast.[3] While it may not have determined the precise relationship of each of the union members to the packers to whom the catch was sold, it represented an effort on the part of the government to subject the union to the criminal sanctions of the Sherman Act. That effort would have failed had the proof established that the union members were the employees of the packers.

Thus, when the assessment was made against the respondent, the government was taking a position inconsistent from that urged in the anti-trust suit. To a large extent the respondent was in the same position as was the Nut Margarine Company when the assessment was levied upon it. Both felt that the government's assessment was inconsistent with its prior action. Such inconsistent actions were considered by this Court to be material factors in *Nut Margarine*.

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[2] 15 USC Sect. 1.

[3] Elmer Williams, President of respondent, testified before the grand jury in that case. (R. p. 56).

II.

Consistent With the Government's Contention That the Relationship of the Packers and Captains and Crew Members Was Not That of Employer-Employee, the Government Did Not Resist the Issuance of a Temporary Restraining Order in This Case.

The record shows that when the government through its attorneys appeared at the hearing on the application for a temporary injunction, the government through its representatives did not consent to the issuance of the injunction, and did not resist it. The attorneys appearing for the government were under instruction from the Department of Justice in Washington, D. C., to proceed in that manner. (R. p. 28.) We think that this implied consent of the government to the issuance of the temporary injunction is a complete and adequate answer to the general argument[4] that the granting of the injunction undermines the purposes of Section 7421(a), and to the specific argument that the Section 7421(a) will not have its intended effect unless applied at the earliest possible stages of proceedings, ". . . particularly in the district Court's action on the application for a preliminary injunction."[5]

If the effect of the section was to be applied at the time the matter was presented to the lower Court, the government should have resisted the application.

Of greater significance is the fact that the government argues that the lower Court had no jurisdiction to try the case; and this Court should reverse the lower Court

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[4] Proposition E, page 25, petitioner's brief.
[5] Petitioner's brief, first full paragraph p. 27.

with instruction to dismiss the complaint. As we read that argument, the government is contending that the lower Court had no jurisdiction or power to entertain the suit, that the suit should have been summarily dismissed upon its presentation; that the Court had no power to determine the ultimate and controlling fact that is: whether as a matter of fact the respondent was a taxpayer within the meaning of the subject statutes.

At the threshold of this case, when the Court was looking to the government for an expression of its position, the Court was advised that no resistence would be offered. Under those circumstances the Court issued the temporary injunction. It had jurisdiction of the parties, and of the subject matter.[6]

III.

Payment of the Assessment Would Have Wrecked the Corporation and Thrown It Into Bankruptcy.

The lower Court found as a fact that the corporation had no assets with which to pay the assessment, and that if it had been required to pay the assessment would have been ruinous. (R. p. 279.) The government does not argue that the Court's finding in that respect is errone-

[6] In **Miller v. Nut Margarine Co.**, 284 U. S. 498, the government urged reversal on the grounds that the court had no jurisdiction to issue an injunction, being prohibited sect. 3324, USC title 26, sect. 154, the statute then prohibiting the issuance of an injunction. In reaching the conclusion which it did, this court necessarily resolved that contention against the government. The elements of jurisdiction have been declared to be (1) The court must have cognizance of the class of cases to which the one to be adjudged belongs; (2) The proper parties must be present; (3) The point to be decided must be in substance and effect within the issue. **Noxon Chemical Products Co. v. Leckie**, 39 Fed. (2d) 318 (C. C. A. 3) cert. denied 282 U. S. 841.

ous, and it must be accepted as a fact. Therefore, we are not confronted with mere hardship in the payment of the tax, but an assessment against respondent which would have destroyed its very existence. Such a situation was considered special and extraordinary circumstance in *Miller v. Nut Margarine Co.*[7]

IV.

There Was No Clear, Adequate Or Speedy Remedy at Law Available to the Plaintiff.

Accepting as a fact that the respondent was unable to pay the assessment, and did not have assets on which it could borrow the money to pay the assessment, it was without a legal remedy. We are in agreement with the government's statement that ". . . Congress has made no exception to the government's right to collect Social Security and unemployment taxes before issues of liability with respect thereto are adjudicated."[8] Congress has provided no remedy in tax court by which the liability for Social Security and unemployment taxes can be litigated without the necessity of payment of the assessment. The only statutory remedy is to pay first and then litigate. The government suggests in its statement of the case that the respondent could pay a single quarter, thus avoiding the ruinous aspects of the assessment, file a claim for refund and, upon it being rejected, sue for recovery. The government does not develop this

[7] 284 U. S. 498, 510. It requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law.

[8] Petitioner's brief, middle of page 17.

theory in its argument. In fact, the suggestion that less than the full amount could be paid is not consistent with its argument that the government was delayed ". . . almost two years in the collection of a tax assessment which Congress has determined the government may **collect** and **use** pending judicial resolution of any bona fide disputes as to liability." (Emphasis added; petitioner's brief p. 27.)

Since the government has failed to press the theory of the divisible nature of Social Security and unemployment taxes, it would seem that this is not a serious question in this case. The correctness of this assumption is emphasized from a reading of the cases cited in support of the theory.

(1) The *Flora*[9] case on rehearing held that in income taxes the taxpayer must pay the whole assessment before he is free to litigate the liability in district Court. It is evident that the government is not relying on the *Flora* case because it holds exactly opposite to what the government contends. What the government is relying on is a footnote in the opinion of the Court on rehearing. That footnote occupies almost four full columns, cites many cases and is as long and complex as a reported decision. In it the Court undertakes to distinguish certain cases cited by the petitioner and groups those cases in blocks from (a) to (e). It is very difficult to understand why the government has referred this Court to that footnote. If there were some clear-cut statement in it to the effect that the respondent had such a remedy as suggested by the government, then we would think that counsel for the government would have told the Court of its

[9] 262 U. S. 145.

location or which of the some thirty-two cases cited in the footnote give the remotest comfort to the government. The only possible connection between the government's theory and the footnote is a statement of the Court which reads:

> "(b) A number of the cited cases involved excise taxes. The government suggests—and we agree—that excise tax deficiencies may be divisible into a tax on each transaction or event, and therefore present an entirely different problem with respect to the full-payment rule."

Addressing ourselves now to the weight to be given the footnote, it is quite evident that the cases grouped under the category (b) are no authority for the theory that the taxpayer could pay part of the assessment and litigate all of the issues, as opposed to the holding in *Flora* that the taxpayer must pay first and sue later.

In the first place, the only cases on which the Court and government agreed involved suits in district Court for the refund of excise taxes. We need not cite authority for the rule that the tax court has no jurisdiction to entertain matters concerning such excise taxes as cabaret tax, nor does the tax court have jurisdiction involving Social Security taxes. So it is that a taxpayer against whom there has been rendered a deficiency assessment for excise taxes or Social Security taxes does not have the choice of litigating in the tax court without paying or paying the tax and subsequently litigating in district Court. In *Jones v. Fox*, 162 F. Supp. 449 (cited in the subject footnote), the Court discussed the *Flora*

case and the point under discussion, relating the reasons why it is right and proper that in excise tax cases the taxpayer may pay less than the full assessment and litigate the factual issues. The Court quoted the following language found in *Friebele v. U. S.*, D. C. N. J., 1937, 20 F. Supp. 492, 294:

> "Income taxes and estate taxes flow from calculations involving complicated considerations of credits, exemptions, etc. The resulting tax has been influenced by and reflects these considerations. They are not naturally separable as in the case of the stamp tax. It is a wise law that governs their prepayment before suit can be brought. Otherwise, the power of collection of taxes would be continuously impeded and rendered practically useless. But in the case of these separable items the issue is clear-cut. There can be no complicated questions of credits, exemptions and the like. It is simply an issue of whether or not the stamp should be applied and in what amount."

The controlling consideration is the divisible nature of the tax. At no time during the trial of this case did the government suggest in its pleadings or as a defense to the issuance of the injunction that the respondent could divide the assessment of $41,568.57. As a practical matter it was impossible for the respondent to make an accurate estimate of the amount due for a quarter for one or more fishermen. Consider these complicating factors: First, the captain of the vessel received a check for the catch after deducting the boat and rig shares. The respondent did not always know the personnel constitut-

ing the crew, nor did it have any control or wish to control the distribution of the net proceeds realized from the sale of the catch. Assuming that the boats were operated by a crew averaging one captain and two crew members, it is apparent that two-thirds of respondent's so-called employees might draw their so-called wages in a variety of percentages, depending upon the agreement they had with their captain. Next is the problem of "brokers." If a captain and crew had one or more brokers, their share of wages might not be known until the season was completed. And, finally, we have the problem of whether the share of the rig earned by the captain and crew was to be treated as wages, and, if so, how it was to be divided.

Furthermore, this remedy, if it exists, is not plain. The government can shift its position according to the special circumstances of the case. It can contend in those cases where partial payment is made that the Court has no jurisdiction, *Jones v. Fox*, *supra*, or where faced with the possibility of an injunction can argue that the respondent could pay a fractional part of the assessment and litigate the issues. We are directed to no rule, regulation or decision spelling out the remedy in cases such as this. That the so-called remedy to pay less than the full amount is not plain or even exists is further demonstrated by the other case[10] cited by the government. There the plaintiffs sought to litigate the liability of penalties assessed against them as officers of a corporation for willfully failing to pay over to the Internal Revenue Service the withholdings of income taxes and Social Security taxes made by the corporation from the wages of its employees. The plaintiffs paid fifty dollars to the IRS and thereafter

[10] Steele v. U. S. 280 Fed. (2d) 89 (C. A. 8).

brought suit in the district Court for refund. Relying on the first *Flora* decision,[11] the Court sustained the government's motion to dismiss. Plaintiffs appealed to the Court of Appeals, and during the interim this Court reconsidered *Flora* and entered in its opinion on rehearing.[12] The Court accepted the stipulation of the parties, wherein they agreed that the full payment rule is not applicable to an assessment of divisible taxes. We respectfully submit that neither *Flora*, footnotes 37 and 38 in *Flora*, nor *Steele* held that Social Security and unemployment taxes levied under the circumstances existing in this case were of a divisible nature. It is clear that at the time this suit was filed the respondent had two alternatives: it could seek an injunction or it could permit the government to exact a payment of $41,568.57 in the guise of a tax and thereby ruin the taxpayer financially.

V.

The Delay in the Trial of the Case Was Caused by the Government and Worked No Hardship on the Government.

As an equitable consideration, it was the respondent which pressed for a trial and the government which delayed the hearing on the merits. The temporary injunction was issued in September of 1957. The government did not file its answer when due, but waited some seven or eight months to file its responsive pleading. After the case was at issue, the plaintiff sought to obtain a trial, but it appeared that the government might stipulate the facts. A stipulation was prepared and submitted, and

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[11] 357 U. S. 63.

[12] 362 U. S. 145, footnotes 37 and 38 were the basis for the court of appeal's disposition of Steele v. U. S. supra.

several months elapsed, during which the government was presumably attempting to determine if it could stipulate. When it became evident that the stipulation was not acceptable, the plaintiff pressed for a trial. From the time the temporary injunction was obtained over a year elapsed before the respondent could obtain an expression from the government as to whether and how the case would be tried. After the trial, a busy district judge rendered his opinion without undue delay, and thereafter such delay that has been occasioned in the final disposition of this case was a result of the government's appeals.

The government complains that it was deprived of the use of respondent's money during the period it took this case to reach this Court. The validity of this argument is difficult to grasp. First, this appeal is confined to the very narrow question of whether the lower Court had jurisdiction to enter the injunction. There is no complaint made here that the lower Court's conclusion with respect to the relationship of the respondent to the captains and fishermen was clearly erroneous. Judge Rives in his dissent did not touch on that point, confining his dissent to the procedural question surrounding the right to injunctive relief. Therefore, it must be taken as admitted that the respondent was not liable for the taxes assessed by the government and must follow in addition that the government was deprived of nothing to which it was entitled.

These considerations are of vital importance in this case. First, we are dealing with equitable consideration, the exact boundaries of which were not defined in *Miller v. Nut Margarine*, but *Miller* stands for the proposition

that though the sovereign has not consented to be sued, and has expressly declared that no injunction may issue, the sovereign will not permit an unconscionable wrong. In determining whether one branch of the sovereign should protect the threatened action of another branch of the sovereign, these questions become material:

(1) Will the threatened action result in the ruin of the citizen? It was found as a fact in this case that it would.

(2) Will the orderly collection of revenue be disturbed? As an example, from the data available to us, it appears that the Social Security taxes levied against respondent for the year 1953 constituted .0000014% of the total social taxes collected during 1953.[13]

(3) Was the assessment of the taxes probably illegal? Not long before the bill for injunction in this case was submitted to the lower Court, that judge had presided in the anti-trust case against the fishermen's union. When this case came on before him, the government did not resist the issuance of the injunction. As in *Miller v. Nut Margarine*, a development of the factual issues resulted in the conclusion that the plaintiff did not in fact owe the taxes assessed.

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[13] The levy of Social Taxes for the year 1953 was $6497.00. (R. p. 5, Exhibit "A" to Complaint). The total social security taxes collected in 1953 were $4,589,230.00. Bureau of Old-Age Survivors Insurance, Social Security Administration, Department of Health, Education and Welfare. It is reasonable to assume that the percentage did not materially increase during the years 1954 and 1955.

(4) Did the respondent have available a legal remedy? We have demonstrated in our fourth proposition that the answer to this is: No.

From this we conclude and submit that if the facts and circumstances in this case did not develop precisely as they did in *Miller*, still the exception to the no injunction statute which *Miller* represents was and is broad enough to permit the Court to enjoin the government from committing an unconscionable wrong.

VI.

The Plaintiff Was Not a Taxpayer.

Throughout the government's brief the respondent is referred to as the taxpayer in terms of the Social Security and unemployment compensation statutes. When we take issue of this characterization of the respondent, it is more than a quibble. From the very moment the investigation commenced leading to the imposition of a crippling assessment, the respondent has denied that it was a taxpayer in terms of the subject statutes. In this regard, as has been said before, respondent was in exactly the same position as was the Nut Margarine Company in the *Nut Margarine* case.

What motivated the Collector of Internal Revenue to impose the assessment we do not know, but we do know that his conclusions ran contrary to the sovereign's contention in *Gulf Coast Shrimpers and Oystermen's Assn. v. U. S.*, and again to that extent the respondent and the plaintiff in *Miller v. Nut Margarine* were in the same position.

Finally, the government does not argue to this Court that conclusions of the trial Court with respect to the relationship were erroneous.

DISCUSSION OF AUTHORITY.

(1) **Respondent's Authority:**

From the foregoing argument we submit that the respondent, a valid, going concern, engaged in the business of leasing boats, and acquiring raw seafood products, was never considered by the government to be the employer of the men working the boats; that the government in the anti-trust case took the position that by and large the fishermen were not the employees of the companies to which they sold their product; that when this case was initiated, the government did not resist the issuance of the injunction, which action was consistent with its action in the anti-trust case; that the payment of the assessment would have wrecked the corporation, which had no plain, adequate or speedy remedy at law. Finally, the delay in the trial of the case was caused by the government, and the respondent was not a taxpayer.

We believe that those facts and circumstances are sufficient to bring this case within the rule of *Miller v. Nut Margarine Company*. The *rationale* of the *Miller* case has been applied in controversies involving Social Security and unemployment taxes, the payment of which would have ruined the plaintiffs. See *Midwest Haulers v. Brady*, 128 F. (2d) 496 (C. C. 6th), and *John M. Hurst & Co. v. Gentch*, 133 Fed. (2d) 247 (C. C.-6th).[14]

[14] In both cases the plaintiff sought and obtained an injunction against the collector, enjoining him from collecting FICA and FUTA

From a careful reading of *Kaus v. Huston*, 120 F. (2d) 183, it appears that the assessment was only $1,150.53, and that the payment thereof would have merely worked a hardship on the plaintiff. He further contended that if it were judicially determined that he was liable for the subject taxes, his business would be ruined. On that basis the lower Court and Court of Appeals were justified in concluding that the plaintiff was merely a taxpayer resisting payment of taxes which he believed he did not owe. Two of the vital requirements of *Miller* were not present: (1) He had a remedy at law, and (2) the imposition of the assessment was merely a hardship. Neither of those were present in *Miller* nor in this case. (For a full collection of the cases involving injunctive relief see 65 A. L. R. (2d) 550.)

(2) **Petitioner's Authority:**

The majority in *Allen v. Regents*, 304 U. S. 439, cited by the government did not believe that the proper remedy for the contesting an assessment or collection was an action for recovery for the payment of the tax, for the majority expressly held that the complaint stated a cause of action, permitting an injunction to issue. The Court went on to hold that the tax being the subject of the suit was not an unconstitutional burden on interstate commerce.

Bull v. U. S., 295 U. S. 247, and *State Railroad Tax Cases*, 92 U. S. 575; *Phillips v. Commissioner*, 283

taxes. In Brady the taxpayer owed some of those taxes and the suit was brought for the purpose of enjoining the collection of additional taxes.

U. S. 589, and *Flora v. U. S., supra*, are presumably cited to call attention to the expressions contained therein that the government has adopted a pay now, sue later policy. The same can be said of *Cheatham v. U. S.*, 92 U. S. 85, wherein the Court discussed at length the reasonableness of the taxpayer's remedies.

In *Enochs v. Green*, 270 F. (2d) 558 (C. A. 5th), the taxpayer probably owed some Social Security taxes, which fact alone distinguishes that case from the present one.

The actual holding in *Homan Mfg. Co. v. Long*, 242 F. (2d) 653, was that summary judgment did not lie in the particular case. The Court reached no conclusion with respect to whether the facts before evidenced "administrative caprice."

Snyder v. Marks, 109 U. S. 189, cited by the government as defining the word "tax," is distinguishable from *Miller v. Nut Margarine* and this case on the simple ground that in both the parties were not mere errors in the assessment. In this case and in *Miller* there was contended an absolute immunity from all or any part of the assessment, which contention was subsequently borne out when the facts were developed.

Missouri Valley Intercollegiate Athletic Assn. v. Bookwalter, 276 F. (2d) 365, and the remaining cases cited in footnote 12, page 22, of the government's brief, are clearly distinguishable. In *Bookwalter*, the Court said

". . . in reality the dispute is solely over the amount of the tax due, which issue cannot justify the exercise of equity jurisdiction."

Mensik v. Long, 261 Fed. 45 (C. A. 7), involved income taxes and the correctness of the assessment. The plaintiff charged the collector with error in including certain items in his income. There was a probability that the plaintiff might be liable for all of the assessment, part of it or none of it. In *Miller* and this case, plaintiffs contended that the subject tax did not apply to them.

The *Clegg* cases cited in footnote 13, page 24, of the government's brief, have not been reported, and we do not know what they decided. We do know that the National Labor Relations Board has resolved factual issues similar to those presented to the trial Court in a way which is consonant with the decision reached by the trial judge.[15]

CONCLUSION.

The government recognizes that *Miller v. Nut Margarine* represents an exception to Section 7421(a) and does not argue that this exception should be judicially erased. The vital equitable considerations outlined in *Miller* were found to be present in this case. The gov-

[15] See: NLRB decisions cited in N. 3, opinion of court of appeals, R. p. 288.

ernment does not contend that those findings were clearly erroneous. Therefore, this case should be affirmed.

Respectfully submitted,

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CERTIFICATE.

I hereby certify that a copy of the foregoing brief for the respondent has been served on the Solicitor General, Department of Justice, Washington 25, D. C., by air mail, postage prepaid, this _____ day of April, 1962.
